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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 256.

UNITED STATES OF AMERICA,
Appellee,

—against—

HERMAN RUBIN, impleaded with MAXIMILIAN GOLDSTEIN, BENJAMIN SCHWARTZ, *et al.*,
Appellants.

BRIEF OF DEFENDANT-APPELLANT HERMAN RUBIN.

HERMAN RUBIN,
Appellant pro se.

ALPERT PRESS, BROOKLYN, N. Y. TEL. TRIANGLE 5-1058-1059

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BRIEF OF DEFENDANT-APPELLANT HERMAN RUBIN.

This defendant appeals from an affirmance in the Circuit Court of Appeals of a judgment of conviction of using the mails to defraud, and conspiracy.

The jury recommended clemency (p. 5202) and a sentence of six months' imprisonment was imposed.

In order to spare this Court the time and effort which repetition here would entail, the writer, with the permission of counsel for the other appellants (and we hope with the approval of this Court) will adopt such of the recitals and arguments in their briefs which apply with equal force to this appellant as to the others.

Since it was understood at the trial that any objection by or ruling as to one defendant would be considered as made by and with respect to all the others (pp. 962-963), we pray that any determination in favor of the other appellants will be made with respect to this appellant Rubin.

THIS APPELLANT.

Rubin was a man who had little pleasure out of life.

Despite a limited education and many hardships he managed to be able to embark in his own business at the age of 25 (pp. 4306-7); he labored from 15 to 18 hours a day for 7 days a week and did not marry until he was 35 years old (p. 4308).

Much may be made of the fact that Rubin carried a large amount of insurance; but his father had died when he was 12 years of age and he had had to work hard (p. 4306). He therefore would be one to appreciate the value of insurance, and so in 1914, at the age of 20, he obtained his first policy of $2,000.00.

In 1922, he obtained $5,000.00 more; in March, 1927 he added $13,000.00 and in December, 1927 (which will be recollected as during "boom" times) he added $10,000.00 more; in April, 1929 he added $25,000.00 and in December, 1931, shortly after the birth of his boy he added the last $25,000.00, in which the baby was named as beneficiary, *but this last policy, significantly enough, made no provision for disability benefits* (pp. 4308-4309).

That policy was the nearest to the inception of his illness some four years later, but that insurance contained *no* disability benefits—and yet the man is now accused of carrying heavy insurance in pursuance of a scheme to defraud!

He was not given to collecting on insurance claims!

He had had two accidents. On one he filed no claim at all, on the other he settled for half (pp. 4310-4311).

Unlike the other claimants in this case, Rubin did not go to the Garrows specifically for his insurance claim; he had been represented by them prior to filing his claim here (pp. 4309; 4311-4312).

POINT I.

THE TRIAL COURT ERRED IN RULING THAT THE TESTIMONY OF MESSMAN AND GARROW WAS ADMISSIBLE AND IN LIMITING THE SCOPE OF THE PRELIMINARY HEARINGS.

In respect to these points, we respectfully ask the Court to consider the discussion of these questions as embraced in the briefs submitted on behalf of Dr. Maximilian Goldstein and Dr. Benjamin Schwartz with like effect as though repeated *in extenso* here.

It is, however, important to note that the intercepted conversations which affected this appellant Rubin numbered 35 (p. 148), and in some of them we believe he was the sender, so that he would have standing to complain of their divulgence, which was the point on which the opinion of the Court below turned.

POINT II.

THE CHARGE TO THE JURY WAS ERRONEOUS AND PREJUDICIAL TO DEFENDANT RUBIN.

In addition to the arguments presented by the appellants Goldstein and Schwartz with respect to the charge to the jury, this appellant specifically alludes to phases of the charge applicable to him alone.

The Trial Court, speaking of the defendant claimants including Rubin, stated (printed p. 11, fol. 19):

> "Of course it is a striking thing that each one of them asserted a heart condition. You have probably observed that."

And then later he referred to certain subjects for examination, including "what the defendant Rubin has revealed of himself and his mental and moral processes while he was a witness on this stand" (p. 11, fols. 19-20).

Due exception was taken to that portion of the charge that each asserted a heart condition and also where reference was made "to certain evidence which might be considered adverse to Rubin without reference to the explanatory evidence on the same matter" (p. 5157):

The Trial Judge sought an explanation of what counsel had in mind, but no explanation was given because no explanation could be given, since, as stated by Rubin's counsel: "I think your Honor should have referred not only to what *you* had in mind but also to evidence which was introduced in explanation on the same subject" (pp. 5157-5158).

This Court will discern that the main charge did not indicate what the Trial Court had in mind as revealing of Rubin "and his mental and moral processes." Whatever it was that the Trial Court had in mind should have been either elucidated in the charge or at any rate whatever evidence there was in explanation of the same features of the case should have been brought to the attention of the jury.

Rubin's attorney also took exception to the reference to Dr. Goldstein's letter (p. 18, fol. 32) which will undoubtedly be covered in Dr. Goldstein's brief.

Another error which arose in connection with the charge was the Court's refusal to charge the request numbered 10 (p. 5164) which read as follows:

> "10. In order for a claimant to recover on a claim for total and permanent disability, he need not be absolutely helpless" (p. 5093).

That is the law in New York State.

> (Concurring opinion of Davis, *J.*, in *Waldman* v. *Mutual Life Insurance Co.*, 252 App. Div. 448, 451; *Shabotzky* v. *Equitable Life Assurance Society*, 257 App. Div. 257 at p. 260.)

The Trial Judge refused to so charge because he said that it was not in issue here since it had reference to the test to be applied in a civil action (p. 5164).

However, it must be agreed that *if* Rubin *was* totally and permanently disabled by the tests which would have been applied in any civil action brought by him against his insurers, then he could not be guilty of fraudulently presenting a claim for total and permanent disability. Hence, this request should have been granted.

The same was true with respect to the requests to charge numbered 11 to 18 inclusive (p. 5093), all of which, without unnecessarily repeating them here, tended to define the term "total and permanent disability" as that term had been construed in the State Courts.

Thus, request number 11 which was denied (p. 5164), read as follows (pp. 5093-5094):

> "11. A claimant in such a case is fairly entitled to make claim for disability if he is disabled to such an extent that he is unable to perform services of the type required in commonly accepted occupations or forms of employment."

That request was eminently proper under *Weisser* v. *Travelers Insurance Company*, 258 App. Div. 755.

The request numbered 12 was proper under *Waldman* v. *Mutual Life Insurance Company*, 252 App. Div. 448, 450.

And so each and all of those requests could be justified under the cases heretofore decided in the State Courts.

Each refusal to charge entitled defendant involved to an exception (pp. 5166-5167).

Certainly defendant Rubin was entitled to have the jury thoroughly instructed on the subject of "total and permanent disability" because a man should not be convicted of fraudulently claiming something which actually exists as a fact. In short, if Rubin was in fact "totally and permanently disabled," even though the test applied be the test which would be employed in a civil action involving that question—indeed, just *because* that test would be *properly* employed in such civil action—then he could not be guilty of fraud in the presentation of any such claim.

These rulings were particularly harmful to this appellant in view of the fact that there was in this case no proof of the least guilt on the part of Rubin save from the lips of Messman and Garrow. Eliminate either one of them and there was no evidence of anyone's guilt.

The Government's own proof quite clearly demonstrated that Rubin was actually sick and disabled and that he was not simulating his condition.

In June, 1935, Dr. Lee of the Travelers Insurance Company, examining Rubin for reinstatement of his policy, *refused to recommend Rubin for disability benefits* (Govt. Ex. 149). Rubin probably had traces of impending illness as early as that June, 1935, although he didn't know it at the time.

He became really sick in October, 1935 (p. 4318).

On December 17th, 1935 Rubin went to Dr. Loewe (pp. 4326-4327)—and here is where the Government's own proof established this defendant's claim as bona fide.

Dr. Loewe's electrocardiogram (part of Govt. Ex. 56) indicated the presence of a "Q" wave in lead "3" and it stated that the man was suffering with "myocardial damage" (meaning damage of the heart muscle).

His certificate (also part of Ex. 56) recited "angina pectoris," "coronary artery disease," "muffled heart sounds; retinal sclerosis; cyanosis; poor response to exertion."

Certainly such findings are not characteristic of good health.

The Government produced Dr. Harold E. B. Pardee, who is probably recognized as the outstanding authority on cardiology in this country.

Dr. Pardee on his *direct* examination by the U. S. Attorney said, while looking at and being shown Dr. Loewe's December, 1935 electrocardiogram of Rubin, that it was normal *except* for a large "Q" wave in the third lead (p. 3361) and after further interrogation, he said (p. 3364):

> "But I *can* say that all of the Q waves that are found the *larger* percentage are present *in patients*

who have heart disease. If you had a *hundred* records *with* Q waves perhaps only *one* of those would be from a patient who did *not* have heart disease.

Q. Now, Doctor,—— A. (continuing) It might be two—*no, one is fair.*"

That from a Government expert, a prominent cardiologist, and on his direct examination!!

Dr. Levy, another Government heart specialist, practically coincided with that view (pp. 5053-5054; 5068-5069).

Dr. Wallach (one of Rubin's experts) testified to the same effect (pp. 4586-4587).

So that here we had an electrocardiogram of this defendant Rubin, which had been taken by an honest doctor in December, 1935, months and months before there was any claim of even a semblance of digitalization and it was pronounced by dependable witnesses, including *eminent specialists produced by the Government*, as indicative of heart pathology—and yet the jury convicted this defendant of participating in a conspiracy to defraud because he claimed in 1936—the following year—that he was afflicted with heart disease.

Assuredly, the errors in the Court's charge contributed to the conviction.

In early 1936, Rubin went to see the defendant Dr. Benjamin Schwartz (pp. 4329-4330).

Dr. Schwartz's electrocardiogram (Ex. W) was like Dr. Loewe's (Ex. 56).

Dr. Wallach said so (pp. 4586-4587).

Dr. Levy, one of the Government specialists, said they were "essentially the same" (pp. 5053-5054; 5068-5069).

Dr. Wallach, Dr. Pardee *and* Dr. Levy (the last two being Government witnesses) agreed that Dr. Loewe's e.k.g. of December, 1935 was pathological (pp. 3364; 4586-4587; 5053-5054; 5068-5069) and all this was as of a date many months *before* any digitalis was claimed to have been used, *before* any falsification of any symptoms was claimed to have been practiced.

Dr. Schwartz's e.k.g. (Ex. W) was therefore also pathological and his certificate regarding Rubin (Ex. 38) was therefore correct and true.

Then in August, 1936, Rubin went to defendant Dr. Maximilian Goldstein, who took an electrocardiogram.

That e.k.g. (part of Govt. Ex. 56) was also like Dr. Loewe's of the prior December (part of Ex. 56).

Dr. Wallach said that it was (pp. 586-4587).

He was not contradicted.

Government specialist Dr. Levy agreed that it was and said it was "suggestive" of heart trouble (pp. 5068-5070).

Dr. Pardee, as hereinabove stressed, had already characterized Dr. Loewe's e.k.g. as pathological (pp. 3361; 3364).

And then we go to the visit of Rubin to Prof. Wyckoff on September 8th, 1936.

Prof. Wyckoff made certain *ob*jective findings, *findings which could not be controlled by the patient.*

His report (Ex. 48) referred to a "slight pallor; slight cyanosis. * * * First sound at apex of poor muscular quality * * * short systolic murmur at apex."

Pallor, cyanosis (bluishness) and murmurs are *not* within the power of the patient to control (p. 1498).

These are all *ob*jective findings, every one of them indicative of heart pathology.

Defendant Dr. Maximilian Goldstein in his report (part of Ex. 56) had alluded, among other things, to the "cyanosis" and to "poor muscular quality" (of the heart).

Prof. Wyckoff found the same symptoms, *ob*jectively (Ex. 48), as did Dr. Goldstein (part of Ex. 56).

On what basis then rests the claim that defendant Dr. Goldstein's certificate (part of Ex. 56) relative to Rubin was false, when Dr. Wyckoff found the same *ob*jective symptoms?

Wasn't it funny that Dr. Loewe *and* Dr. Wyckoff *and* Dr. Wallach *and* Dr. Goldstein should *all* find cyanosis, which can*not* be controlled by the patient? (pp. 1498; 4586.)

Where was Prof. Wyckoff's electrocardiogram which would have shown if digitalis had been administered as testified by Garrow?

The Wyckoff report (Govt. Ex. 48) said "E.K.G. normal" meaning that the electrocardiogram was normal.

If it was normal, how could it have been influenced by digitalis to show disease?

The "summary" of his report showed that the man had symptoms of "cardiac insufficiency."

Was Prof. Wyckoff's report to be ignored?

Oh yes! They claimed that it had been "changed."

What was the "change"?

Miss Foster, Dr. Wyckoff's secretary, testified (p. 2865):

> "On reading the note expressing Dr. Goldstein's wishes Dr. Wyckoff said: 'Inasmuch as I have told the Doctor by word of mouth that he had a coronary disease, I see no reason why I shouldn't put it in the report!"

Thus, from the Government's own witness, it developed that Dr. Wyckoff had *actually told* Dr. Goldstein that this defendant Rubin really had a *"coronary disease."* Consequently, reciting that *fact* in the report should not have been portrayed before the jury as a "change."

Was Dr. Wyckoff to be disbelieved too?

WHY?

With a normal electrocardiogram, there could not have been any digitalization as testified by Garrow.

Dr. DeGraff, on behalf of an Insurance Company, examined Rubin on December 8th, 1936 (p. 2177).

His report (Govt. Ex. 46) showed "slight sclerosis of retinal arteries * * * A-2 greater than P-2 and slightly accentuated * * * *blood pressure near upper limit of normal.*"

These, though, were all symptoms which could not be controlled by the patient and, inasmuch as they existed, they could not but be evidence of a diseased condition and would exclude any claim of fraud.

Then a week after Dr. DeGraff examined Rubin, Dr. Costigan examined him on behalf of the Travelers Insurance Company (p. 2087).

He came *unexpectedly* and without an appointment (p. 2088).

It is vital to note that this doctor, who took no e.k.g. (p. 2097), found a bad heart.

He found a blood pressure of 164 over 100 and an overacting heart (pp. 2091; 2094; 2098).

A man cannot himself control his blood pressure nor his heart action (pp. 1499; 2096; 2098).

Admittedly digitalis cannot produce high blood pressure (pp. 1499; 2096).

Dr. Bensel, a Government witness, admitted that this blood pressure of 164 over 100 was well outside, or as he put it "without," the limits of normal (p. 2173).

Dr. Costigan said that high blood pressure, if not cared for, could lead to serious results (pp. 2095-2096).

His diagnosis was coronary sclerosis and hypertension (p. 2091).

Dr. Master, who unexpectedly visited Rubin on February 13th, 1936 (pp. 3323-3324; 3327) said concerning a murmur over the entire heart (p. 2284):

> "It may indicate nothing in the sense that it may be functional, and it may be associated with, very often, with hypertension. A systolic murmur is associated with hypertension, that is high blood pressure."

Dr. Master found a blood pressure of 170 over 94 and 160 over 90 (pp. 2275; 2279).

The murmurs and blood pressure cannot be controlled by the patient (pp. 1498-1499; 2096; 2284).

Dr. Bensel said that such blood pressure was with*out* normal limits (p. 2173).

This Court will observe that in propounding the hypothetical questions to the doctors produced by this defendant Rubin, his attorney was careful to enumerate principally

only objective symptoms (pp. 4579-4584; 4619-4622) which the patient could not control and which digitalis could not affect.

Based on those objective symptoms alone, his doctors said that he was suffering with an ailment, the effect of which was to totally and permanently disable him (pp. 4584; 4587-4588; 4592; 4622).

All that Dr. Levy would say was that the "Q-3" in Dr. Wallach's electrocardiogram was not pathological (p. 5057).

But Dr. Pardee, the outstanding cardiologist of this community, said of a precisely *similar* "wave" in Dr. Loewe's e.k.g. that it *was* pathological (pp. 3361; 3364).

If two such eminent authorities disagree, who are we to say that we know, who are we to say that because this defendant accepted Dr. Loewe's diagnosis (which Dr. Pardee impliedly approved) that he was a fraud?

Both Government witnesses, Dr. Bensel and Dr. Levy, admitted that angina and coronary artery disease could be present with normal blood pressure and a normal electrocardiogram (pp. 2171-2172; 5070).

It was therefore thoroughly established—and from competent Government witnesses—that this appellant was afflicted with coronary artery disease.

It is therefore apparent how Rubin was prejudiced by the Trial Judge's refusal to charge, as requested, on the subject of total and permanent disability.

The next question would be whether Rubin was in fact digitalized, whether he in fact participated with Garrow and Messman in this attempt to deceive the insurance companies.

There was certainly no digitalization at the time of the Loewe visit in December, 1935.

Garrow put the first digitalization in August, 1936 (pp. 2424-2425).

Messman put it in late September or early October, 1936 (p. 1567).

It is uncontradicted that a "Q" wave (such as appeared in Dr. Loewe's e.k.g.) can*not* be affected by digitalis (p. 4586).

Dr. Loewe was not in any way involved in this conspiracy.

Dr. Pardee said that Dr. Loewe's e.k.g. showed heart trouble (pp. 3361; 3364).

Dr. Levy said it was "suggestive" (pp. 5053-5054; 5068-5069).

In December, 1935 then, the electrocardiogram of an honest doctor, long before any claimed digitalization, showed heart trouble.

Let us see whether Messman and Garrow were to be believed rather than reputable physicians, many of them Government witnesses.

From the time of his arrest up to the time of this trial, being paid at the rate of $100.00 per week for a period and $65.00 per week for other periods, Messman had collected from this Government over $11,200.00 plus hotel expenses during part of the time (pp. 967; 1278-1280; 1477).

This Court in its opinion in the *Weiss* case (308 U. S. 325 at p. 339) alluded to the fact that Messman's license to practice medicine had not been revoked and that he was the recipient of a salary from the Government.

Indeed, he was receiving $65.00 per week during the Winter of 1939 to 1940, even while engaged in his own private practice (pp. 1477-1478).

For this he was willing to trifle with the liberties of innocent men, he was willing to review more than 3,000 files with insurance companies' attorneys (p. 1280), to review them on occasion as often as ten times a day (pp. 1481-1482).

Why the need to review over 3,000 files if he had only participated, as he testified, in some 60 to 100 fraudulent claims with the Garrows and approximately a dozen with the Weisses (pp. 1293; 1585), unless to enable the insurance companies to attempt to escape responsibility in those other 2900 cases, all at the expense of this Government?

Messman claimed that he told Bernstein (one of the attorneys for the insurance companies) that he couldn't live on the money which he was receiving from the Government and that he directed Bernstein's attention to notices which he received respecting payments falling due on medical appar-

atus purchased by him on the installment plan (pp. 1480-1481).

Why tell that to the attorneys for the insurance companies if he wasn't selling his willingness to testify falsely against these defendants in order to aid the insurance companies in defeating just claims?

What a travesty that Messman, the biggest culprit of all in this entire prosecution, should have been permitted to practice his vocation during the Winter of 1939-1940 at the expense of the Government and to purchase his liberty and livelihood at the altar of these defendants' conviction!!

Garrow presented an equally striking example of unworthiness.

He knew from Rubin's attorney, Schneider (p. 4640), that Rubin had been to Dr. Wallach at the instance of his trial counsel, Mr. Loeb, so, in order to offset Wallach's testimony, Garrow said that *he* had sent Rubin there (p. 2478).

He spoke of Wallach as one of the "doctors that I knew" (p. 2478).

He spoke of him as "Wallach Kaufman" (p. 2478), a name which he repeated on cross-examination (pp. 2954; 2955; 2956), but when it was brought to his attention that there was no such person in existence, he said, "Wallach Kaufman, Kaufman Wallach, it is the same man" (pp. 2956-2957).

To him truth or falsity, accuracy or inaccuracy, made no difference.

And then, to cap the climax, he said, "I did *not* know those men" (p. 2956).

If Wallach was one of the "doctors whom he (I) knew" (p. 2478), why didn't he know his right name? Why did he have the doctor's name twisted? And how reconcile it with his later statement that he "did *not* know those men" (p. 2956)?

He said he sent Rubin to Dr. Wallach because Wallach had issued a favorable report regarding a man named Kaplan (pp. 2955-2956); yet it appeared that Rubin had been to Dr. Wallach in December, 1937 (p. 4572), Kaplan didn't

go to Dr. Wallach until June, 1938 (p. 4613), and yet Garrow somehow convinced the jury that he sent Rubin to Wallach in 1937 because Wallach rendered a favorable report on Kaplan in 1938!!

Where could one begin to believe any such perfidy?

Yet the verdict of guilty which the Government now seeks to sustain meant that Garrow and Messman told the truth and that all the others did not.

Even in their falsehoods, Garrow and Messman could not agree.

There was indeed nothing to this case when calmly and dispassionately viewed in an atmosphere free from the "mass hysteria" of falsities as to numerous defendants heaped upon falsities as to the others.

Had not the errors in the charge been committed, the verdict might well have been one of acquittal.

POINT III.

THE TRIAL COURT ERRED IN PROHIBITING RUBIN FROM PROVING HIS PHYSICAL CONDITION SHORTLY BEFORE THE TRIAL.

Through Dr. Irving R. Roth, a heart specialist (p. 4615), defendant Rubin sought to establish what was disclosed by a physical examination conducted November 21st, 1938 (p. 4616).

The United States Attorney objected on the ground that the examination was too remote from the period covered by the indictment (p. 4616) and when the writer sought to ascertain whether certain *ob*jective findings would enable the examining physician with reasonable certainty to determine for what length of time they existed, the Trial Court sought to pass off the question with the observation that that "would be an opinion" which, in the absence of an examination would not be helpful (p. 4617).

Counsel for Rubin submitted that the *ob*jective findings in November, 1938 (which we attempted to establish as the

result of the doctor's "examination") would be helpful when coupled with the findings as presented by the Government witnesses and exhibits, but the Court suggested that there was already an abundance of testimony as to what physicians found during that time (meaning the period covered by the indictment) and the evidence was excluded (p. 4618).

If the "abundance" of evidence to which the Court referred was the evidence furnished by Doctors Schwartz and Goldstein, it suffices to say that their evidence was under attack in this very trial as being fraudulent and it would not be of assistance to this appellant.

If it meant the evidence of the Doctors called by the Government, certainly Rubin should not have been concluded by that.

Rubin was entitled to show by *independent* proof what his *exact* physical condition was on dates subsequent to those involved in the indictment, viz., November 21st, 1938 and May 29th, 1940 (p. 4619) and the exclusion of that evidence was highly prejudicial, to which exception was duly noted (p. 4618).

Rubin was prejudiced by these rulings in two aspects.

Firstly, he should have been allowed to establish that positive findings or symptoms existent in 1940 would enable his expert to state the length of time that those conditions had *previously* existed, wherefrom it would appear that his prior claim of total and permanent disability was *not* fraudulent and was *not* the result of medication, fake hospitalization or any other element of deception.

Secondly, it was important for Rubin to show that he was in fact "permanently" disabled and to that end it was important for the jury to note that as recently as May 29th, 1940 and practically on the eve of the trial, Rubin was in fact so afflicted. In other words, unless Rubin was disabled at the time of the trial, it would lend credence to the claim of the Government that he was not in fact "permanently" disabled when he originally presented his claim—and hence the exclusion of evidence as to this very vital feature of his claim was of the utmost and vital injury to him.

Thus, the Court specifically charged the jury that as to Rubin the question was if there was a physical impairment, "was there permanent, total disability. Or could the appearance of permanent and total disability be established only through the employment of fraudulent methods and means?" (p. 11, fol. 19). And a few minutes later, again as to Rubin, the Court said the question was whether he misrepresented his actual condition in order to induce the companies to believe that he was permanently and totally disabled.

It was therefore of the *utmost* importance that Rubin establish the *fact* of the *permanency* of his condition and he should have been permitted to establish the disabling character of his condition at the very inception of this trial so that, if Dr. Roth's testimony was accepted, the jury could conclude that Rubin was in fact permanently disabled—and of course if he was in fact permanently disabled then his claim to that effect could not be fraudulent.

Should he not have been permitted to prove the conditions as they existed even at the very eve of this trial and should not the doctor have been permitted to state how long those conditions had existed, based on his observations, from which could have followed the conclusion that Rubin's claim at its very inception was well founded and not fraudulent?

This, then, was an exceedingly vital ruling, highly prejudicial to Rubin's defense.

POINT IV.

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

Respectfully submitted,

HERMAN RUBIN,
Appellant pro se.